TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
APPELLANT,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED APRIL 28, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

In Equity. No. E3003

MOUNTAIN STATES POWER COMPANY, a Corporation, Complainant,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, Jerry J. O'Connell, and Leonard C. Young as Members of and constituting said Commission, Elmer Holt, as Governor of the State of Montana, Raymond T. Nagle as Attorney General of the State of Montana, Al Hansen, as County Attorney of Fallon County, Montana, Rudolph Nelstead, as County Attorney of Custer County, Montana, and The Baker Civic League of Baker, Montana, an Unincorporated Association, Defendants

BILL OF COMPLAINT—Filed September 25, 1935

To the Honorable the Judges of the District Court of the United States for the District of Montana:

Mountain States Power Company, a corporation, hereinafter designated as "the company," complains and says:

I

Mountain States Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to engage in business in Montana in accordance with the laws of the State of Montana, and is doing business in the State of Montana, with its principal place of business and principal address in Montana, at Kalispell, Montana, and as such is a citizen and resident of the State of Montana.

The company is a public utility within the meaning of Section 3881, Revised Codes of Montana, 1921. Sections [fol. 3] 3879-3913, inclusive, Revised Codes of Montana,

1921, are known as the "Public Service Commission Act", (Chapter 52, Laws of Montana, 1913). The company is subject to the jurisdiction of said Public Service Commission of Montana, exercised in conformity with said Act.

II

During all the times referred to herein the company has owned, operated and controlled, and now owns, operates and controls, plant, equipment and facilities for the transmission, delivery, furnishing and distribution to the public for hire, of electric energy for light, heat and power in the towns of Baker, Westmore and Plevna, all in Fallon County, Montana and in the town of Ismay in Custer County, Montana, and in their immediate environs and commonly and collectively referred to as the "Baker District" by way of distinction from other areas, districts or territory served by the company in Montana.

The company's plant, equipment and facilities in said Baker District consist of electric distribution systems in the said towns of Baker, Ismay, Westmore and Plevna, together with electric distribution lines in suburban areas adjacent thereto and electric transmission lines interconnecting each and all of said towns and areas. Said Baker District is one complete electric operating unit or division and is and has been, as developed, so operated under the immediate supervision of one local manager and his staff with offices in said District. The Company serves approximately 750 customers in said Baker District.

The supply of electric energy distributed by the Company to the public in the Baker district as aforesaid, is derived from two sources; (1) by purchase from an electric generating plant located approximately one mile east of Baker, Montana, and owned and operated by Montana-Dakota Power Company, a corporation, and (2) by production by the company at its own steam generating plant located in Baker, Montana. There exists no relationship between the [fol. 4] company and said Montana-Dakota Power Company except that of purchaser and seller, respectively, and the company is a stranger to any and all persons or corporations furnishing electrical energy to said Montana-Dakota Power Company.

The electric energy so purchased and produced is delivered to the company's facilities at Baker, Montana and

transmitted over the company's transmission system, and at said towns distributed and delivered to patrons over the company's distribution system local to each of said towns. In addition, the company furnishes, delivers and distributes electrical energy over its rural lines to patrons and consumers located intermediate to said points and in the vicinity of each thereof. Service to the inhabitants of each of said towns and suburban areas is rendered by the company under one uniform schedule of rates for the various classes of service.

III

The defendant, Public Service Commission of Montana, is an administrative tribunal of the State of Montana, created by the Act (Chapter 52, Laws of Montana, 1913) of the legislative assembly of Montana, aforesaid, and by the specific provisions of Section 3880, Revised Codes of Montana, 1921, may be sued in the Courts of the United States. That said Public Service Commission of Montana is composed ex officio of the three members of the Board of Railroad Commissioners of Montana.

The defendants, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young are the duly and regularly elected, qualified and acting members of and constitute the Board of Railroad Commissioners of Montana and ex-officio the Public Service Commission of Montana, established by the Act aforesaid.

IV

That the said Public Service Commission of Montana exercises jurisdiction over the valuations, and the rates, [fol. 5] schedules and charges made by this company for electric energy, distributed and sold by it in the said Baker District.

V

The defendant, F. H. Cooney, is the duly qualified and acting Governor of the State of Montana, charged as the executive thereof with the enforcement of the laws of said State and made a party hereto pursuant to the provisions of Section 266, United States Judicial Code, as amended on February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, (28 U. S. C. A., Section 380). That said F. H. Cooney,

acting Governor of the State of Montana, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VI

The defendant, Raymond T. Nagle, is the duly elected, qualified and acting Attorney General of the State of Montana, and together with the members of the said Public Service Commission of Montana, is charged with the enforcement of the said Public Service Commission Act. That said Attorney General, Raymond T. Nagle, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VII

The defendant Al Hansen is the duly and regularly elected, qualified and acting County Attorney of Fallon County, Montana. That said Al Hansen did not participate in any of the proceedings herein mentioned as said County Attorney and said County of Fallon was not a party thereto.

The defendant Rudolph Nelstead is the duly and regularly elected, qualified and acting County Attorney of Custer County, Montana. That said Rudolph Nelstead did not participate in any of the proceedings herein mentioned and was not a party thereto, individually or as said County Attorney.

The said County Attorneys are charged with the enforce-
[fol. 6] ment of said Public Service Commission Act under said defendant Attorney General in their respective counties, as aforesaid.

VIII

The defendant, The Baker Civic League of Baker, Montana, is an unincorporated association of persons at Baker, in Fallon County, Montana.

IX

Each and all of said defendants are residents and citizens of the State of Montana. This is a civil suit in equity and the matters in controversy and in question herein arise under the Constitution and laws of the United States of America, as hereinafter more specifically alleged and the

sum in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

X

That on or about February 20, 1935, pursuant to a complaint theretofore filed by an unincorporated association styled Baker Civic League of Baker, Montana, alleging that the rates of the company at Baker, Montana were unreasonably high, unjust and discriminatory, said Commission in its Docket No. 1435, served the company with a Notice of Hearing on said complaint, setting the time therefor on March 14, 1935, at Baker, Montana. Pursuant to such notice a hearing was had before said Commission, commencing on the date aforesaid at Baker, Montana. At said hearing the company presented to said Commission, sworn, competent and material evidence and exhibits in full support and complete justification of its existing rates and property values, and submitted its business to the examination and scrutiny of said Commission and said complainant Baker Civic League. There was not presented to the Commission any substantial, relevant, competent or material evidence or testimony in support of the allegation of said complainant nor in dispute or contradiction of complainant's evidence, testimony and exhibits so presented.

[fol. 7] On or about September 13, 1935, a majority of said Commission, to-wit, Commissioners Carey and O'Connell issued their Report and Order No. 1666 in said Docket 1435, wherein and whereby said Commission purported to fix the present fair value of the company's property in the Baker District and ordered certain material reductions in the existing rates of the company. A full, true and correct copy of said Report and Order No. 1666 is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

XI

Pursuant to the provisions of Sections 3884 and 3895, Revised Codes of Montana, 1921, which provide that the Commission shall value all the property of every public utility used and useful for the convenience of the public, the company made, prepared and submitted to the Commission and offered in evidence at the said hearing before the Commission a complete detailed inventory and appraisal of its

electrical property in said Baker District. Said inventory and appraisal was prepared with great care, in great detail, and by competent and experienced electrical valuation engineers; inspection and a count of all physcial property, so far as the same could be examined, was made in the field, and a study, determination and report was made of the cost of reproduction of said property as of December 31, 1934, including proper allowances for materials and supplies, working capital, going concern value and other elements of value of $156,166.00 upon the basis of reproduction new as of that date; and found, claimed and supported a value of $137,686.00 upon a basis of reproduction new less accrued depreciation.

In addition to presenting evidence with respect to reproduction cost new and reproduction new less accrued depreciation, the company prepared and submitted to the Commission and offered in evidence at said hearing before the Commission, an exhibit and supporting testimony disclosing the book cost of the property in the Baker District [fol. 8] as of December 31, 1934, to be the sum of $152,712.01.

Although received in evidence, these valuations and competent supporting testimony upon the part of the company were given no consideration by the Commission, thus giving no effect whatsoever to any part of the evidence introduced by the company with respect to the value of its property in said Baker District.

No evidence was offered by the complainant Baker Civic League in said proceeding before the Commission with respect to the cost of reproduction, cost of reproduction new less depreciation or book value of the company's property, other than as appears in the reports and exhibits of the company made a part of the record before the Commission.

XII

The present fair value of the company's properties used and useful for the convenience of the public in said Baker District in the State of Montana and as the same existed and was in service on December 31, 1934, (and now exists and is now in service, exclusive of net additions and betterments made since December 31, 1934), was on said date and now is in excess of $137,686.00 (including the steam generating plant at Baker, Montana and including working

capital, material and supplies, going concern value and other proper and lawful elements of value), whereas said Commission fixed said value as of December 31, 1934 at "not to exceed the sum of $55,000.00". If said steam generating plant at Baker, Montana were excluded, the remaining fair value as above indicated would be in excess of $113,580.30.

XIII

The value of $55,000.00 found and determined by the Commission in its said Report and Order No. 1666 was and is unreasonable, arbitrary and confiscatory in that the Commission has failed and refused to consider or find the present true fair value of the company's property; that the [fol. 9] order is not supported by the evidence given in said cause, is contrary to law, is contrary to the facts, is unfair, unreasonable, evasive, confiscatory and void.

XIV

The Report and Order No. 1666 of the Commission is further unreasonable, arbitrary, capricious, confiscatory, unfair, evasive and void in that the Commission has wholly failed and refused to make any findings of fact whatsoever supporting its said order with respect to the value of the company's property; in that through such failure and refusal to make findings of fact as to material or any elements of value going to make up ultimate fair value, it has disregarded the rights of the company, making it impossible of determination, the allowance, if any, so found or made by the Commission for any element of value or whether any allowance whatsoever was made for any particular material, proper and lawful element of ultimate fair value; and in that by its failure to so make findings of fact with respect to value and elements of value, it has displayed a plain intent to make it impossible of determination the consideration or weight it gave to the evidence of the company upon the following elements of value, to-wit: cost of reproduction, cost of reproduction less accrued depreciation, book value, working capital, materials and supplies and/or going concern value and other material proper and lawful elements of value, all of which are essential elements in a proper and lawful determination of the present fair value of the property. The action of the Commission described

in this paragraph in making its Report and Order wholly without and in disregard of findings of fact in support thereof, is unlawful procedure and denies to the company its right to a determination in a lawful manner of the present fair value of its said property.

Good conscience and equity dictate, contemplate and re- [fol. 10] quire that there should be a full and frank disclosure by the Commission of its methods of valuation and that through the making of findings of fact with respect to value and elements of value, ample opportunity shall be afforded to question and contest the methods actually employed and the principles applied. The failure, refusal and neglect of the Commission so to do, has resulted in denying to the company due process of law or equal protection of the law since it hinders and disables the company from attacking the specific errors and omissions made by the Commission and permits only challenge of the erroneous final result.

XV

The value of $55,000.00 so determined by the Commission was determined for the purpose of fixing, establishing and regulating the rates and earnings which the company will be permitted to charge and collect for electric service and for the use of its property and said Commission has in its said Report and Order No. 1666, and will in the future so use and apply the said value or rate base unless restained by order of this court.

Insofar as the value or rate base so determined by the Commission is less than the true and lawful present fair value of the Company's property, to-wit, the difference between $55,000.00 and $137,686.00 (or $113,580.38) as heretofore alleged, said property will be used in public service without any compensation therefor and will be confiscated and taken without due process of law unless restrained by order of this court.

The Commission will have occasion to and is required by the provisions of Section 3899, Revised Codes of Montana, 1921, to, from time to time, consider, fix, establish and adjust rates of the company and in any such proceeding the company will be seriously prejudiced by the facts of said inadequate and invalid valuation of its property so heretofore made by the Commission and the same will be considered by the Commission as the vital, pivotal and con-

[fol. 11] trolling factor in so fixing and establishing such rates. In any such proceeding it will be impractical to secure a reconsideration or redetermination by the Commission of its prior valuation of the company's property and no remedy will be available to the company in respect of said inadequate and invalid valuation in connection with such proceeding or at all. Said Commission has in fact by its said Report and Order No. 1666 so attempted to apply said inadequate and invalid valuation in reducing the rates and earnings of the company as hereinafter more fully set forth.

XVI

The company at the time of the hearing hereinbefore referred to was and continuously from April 1, 1929, to the date of said hearing, had been distributing, delivering and selling electric energy for public and private consumption and use in the towns and areas aforesaid under rates and charges approved and concurred in by the Public Service Commission of Montana, all of which said rates and charges have been in full force and effect since April 1, 1929, pursuant to approval of the said Public Service Commission of Montana. By its said Report and Order No. 1666, the Commission ordered the company to reduce its said existing rates on an average of approximately 32%, to a schedule of rates and charges set forth in detail in said Report and Order No. 1666, (Exhibit "A"). The application of said reduced rates and charges will, on the basis of the 1934 business of the company, reduce its annual gross electric revenue of $32,263.80 under existing rates, to $23,146.80 under the reduced rates, or a reduction of $9,117.00 per year.

Under existing rates, and on the basis of 1934 business, the net return of the company in the Baker district does not exceed 1.49% upon a rate base or value of $137,686.00 and such return does not exceed 2.55% upon a rate base or [fol. 12] value of $113,580.38. Said rate bases or values of $137,686.00 and $113,580.38, being the minimum rate bases or values hereinbefore referred to and being the lowest possible rate bases or values justified by the record before the Commission in the proceeding culminating the entry of the Report and Order No. 1666 (Exhibit "A"). Applying the reduced rates as ordered by the Commission to said

minimum value or rate base of $137,686.00, the company would sustain a loss of $7,062.67 per year and applying said reduced rates to said minimum value or rate base of $113,580.38 the company would sustain a loss of $6,225.26 per year. Under this computation the company's expenses, exclusive of any allowance for depreciation, exceed the annual gross electric revenue by $2,450.26 and $2,288.24 respectively.

Applying the reduced rates as ordered by the Commission to the valuation of $55,000.00 as determined by the Commission, the Company would be operating at a loss of $4,433.24 per year.

XVIII

In addition to the ruinous and confiscatory losses in revenue and earnings which the company would sustain if it were required to accept said valuation of $55,000.00 and the reduction in rates as ordered by the Commission, as heretofore pleaded, the company would sustain other, further and confiscatory losses by reason of the requirement of amortizing and retiring from its fixed capital accounts that portion thereof representing the difference between $152,712.01 (the fixed capital as of December 31, 1934) and said Commission valuation of $55,000.00—or $97,712.01. Assuming such amortization should be accomplished within a period of ten years, the amount to be written off and retired would approximate $9,700.00 per year.

XIX

As heretofore alleged the Commission made no findings of fact in support of its conclusions and order. That portion of Exhibit "A" other than the order proper, has no [fol. 13] designation but appears to be a general statement or discussion of certain issues presented. It is therefore impossible for the company to take specific exception to definite and designated findings.

Reference is made in said discussion in Exhibit "A" to the steam generating plant located at Baker, Montana, to the annual allowance for depreciation of the property and the assertion is made that a reduction in rates would have a tendency to increase consumption. The company excepts to each of these statements and alleges that each of said

statements are contrary to the evidence of record before said Commission and are not supported by the record.

XX

Said valuation of $55,000.00 and any schedule of rates and charges promulgated in accordance with the Report and Order No. 1666, and each of them, is confiscatory, unlawful, unreasonable and void and the enforcement thereof and threatened continuance of said enforcement, as hereinafter alleged, has deprived, now deprives and will continue to deprive the company of its property without due process of law and deny to the company the equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States of America, in that to force and compel this company to sell and distribute electric energy, as hereinbefore provided, under said valuation and/or under said report and order and/or under any schedule of rates and charges promulgated in accordance therewith, would be a confiscation of the property of this company, used and useful in the sale and distribution of electric energy in said Baker District.

XXI

By the terms of said Report and Order No. 1666, which was served upon the company on September 17, 1935, the company was and is required to comply therewith on or before September 25, 1935.

[fol. 14] On September 23, 1935, the company filed with the Commission a petition for rehearing of the issues, matters and things involved in said Report and Order No. 1666, Docket No. 1435, of said Public Service Commission of Montana together with an application for the suspension and stay of said Report and Order, pending such rehearing. A full, true and correct copy of said petition and application is attached hereto, marked Exhibit "B" and by this reference made a part hereof.

On the same day, to-wit: September 23, 1935, said Commission made and entered its order denying both said petition for rehearing and application for stay. A full, true and correct copy of said order is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

XXII

The company is prevented by Section 3906, Revised Codes of Montana, 1921, from obtaining a supersedeas, temporary restraining order and an injunction pendente lite in the courts of the State of Montana, to prevent or restrain the enforcement of the Report and Order No. 1666 with respect to the schedule of rates and charges promulgated by the said Public Service Commission of Montana.

XXIII

The Company has no plain, speedy or adequate remedy at law and the defendants, the Commission, the Attorney General, and the County Attorneys threaten to, and will apply and/or enforce and will continue to apply and/or enforce said Report and Order and the company will be forced and compelled to submit to the confiscation of its property without due process of law and without the equal protection of the laws and in violation of its rights under the Constitution of the United States unless the defendants, through the interposition of the equitable jurisdiction of this court are restrained from so applying and/or enforc- [fol. 15] ing said Report and Order.

XXIV

The company, its officers, agents and employees are required at the risk of heavy, excessive and unreasonable penalties as provided in Sections 3888 and 3908, Revised Codes of Montana, 1921, to comply with said Report and Order. Failure to comply with said Report and Order and to submit to the confiscation of its property as hereinbefore alleged, will subject the company to a multiplicity of suits at the instance of both said defendants and of many of the company's patrons upwards of 750 in number in the Baker District.

The issues which will be presented in each of said multiplicity of suits are presented and can and should be decided and determined in this suit. The application and/or enforcement of said Report and Order by the defendants will result in the total loss of revenue to the company which cannot be recovered in any manner and such loss of revenue will cause the company to suffer great and irreparable damage. If said rates and charges promulgated

by said Commission and set forth in said Report and Order are allowed or permitted to become effective forthwith as ordered and the company should prevail upon final decree herein, the company could not recover the sums to it lost and withheld by its customers under said reduced rates except in rare instances and the company would in many instances be required to sue therefor subjecting itself and this honorable court to a multiplicity of suits for such purpose, few of which, because of the expenses involved, would pay for their prosecution with the result that said loss of monies under the rates and charges promulgated in said Report and Order would be irreparable.

XXV

The company, in connection with its prayer for a temporary restraining order herein, offers to do equity by:

[fol. 16] (a) Impounding the revenues collected by it from its customers from the sale of electric energy on the basis of its existing rates and charges in excess of the revenues which would accrue to the company by the application of the schedule of rates and charges promulgated pursuant to the requirements of said Report and Order, with the Clerk of this Court, or in any bank or depository designated by this court, subject to the order and disposition of this court as to the accounting to customers therefor, or any other details; or

(b) Post and file a bond in such sum and with such surety as to this court may seem adequate, to be approved by the Judge hereof, conditioned that if it shall be held by final and permanent decree herein that said Report and Order, and the rates and charges therein embodied are lawful and not confiscatory, the Company will refund to its customers the excess paid by its customers under and in accordance with the provisions of its existing schedules over and above the rates and charges provided by said Report and Order.

Wherefore, the complainant company prays:

First. That the value of $55,000.00 determined in said Report and Order of said Commission of September 13, 1935, be decreed to be in violation of the Fourteenth

Amendment to the Constitution of the United States and the Report and Order imposing the same, to be void.

Second. That the schedules of rates and charges promulgated and set forth in said Report and Order of said Commission be decreed to be unjust, unreasonable, unlawful and void and the Report and Order imposing the same to be void and that said rates and charges and the Report and Order promulgating the same be decreed to be in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 17] Third. That the existing and presently effective schedules, rates, charges, classifications, rules and regulations of the company as filed with the Public Service Commission of Montana be decreed and declared to be the just, fair, reasonable and effective schedules, rates, charges, classifications, rules and regulations of the company for electric service in the Baker District in Montana and that the company be permitted to continue to charge and apply the same.

Fourth. That a temporary restraining order issue from this court under the seal thereof, effective forthwith, upon such terms as to the court may seem proper and made operative until hearing on application for interlocutory injunction or until the further order of the court, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

Fifth: That an interlocutory injunction issue from this court, under the seal thereof, effective upon such terms as to the court may seem proper and operative until the is-
[fol. 18] suance of a permanent injunction or other final disposition of this cause, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

Sixth. That upon final hearing the said interlocutory injunction be made permanent and perpetual.

Seventh. That the complainant company have such other and further relief as may be just and equitable in the premises.

May it Please Your Honors to grant unto the complainant company a Writ of Subpoena of the United States of America, issuing out of and under the seal of this Honorable Court directed to the said defendants, Public Service Commission of Montana, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young, as Members of and constituting said Commission, F. H. Cooney as Governor of the State of Montana, Raymond T. Nagle as Attorney General of the State of Montana, Al Hansen, as County Attorney of Fallon County, Montana, Rudolph Nelstead,
[fol. 19] as County Attorney of Custer County, Montana and The Baker Civic League of Baker, Montana, an unincorporated association, commanding them, and each of them, on a day certain, to be named therein and under a

penalty to be and appear before this Honorable Court then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the premises and to perform and abide by such orders, direction or decree as may be made against them in the premises.

And the complainant company will ever pray.

Mountain States Power Company, by E. G. Toomey, Residing at Helena, Montana; John W. Chapman, Residing at Helena, Montana; Hance H. Cleland, Residing at Olympia, Washington; Raymond W. Clifford, Residing at Olympia, Washington, Its Solicitors and Attorneys.

Duly sworn to by E. G. Toomey. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana

Report and Order No. 1666

Hearing: March 14th & 15th, 1935.
Decided: September 13, 1935.

Appearances:

For the Baker Civic League: Al Hansen, Attorney, Baker, Montana.

For the Mountain States Power Company: Hance H. Cleland of Cleland & Clifford, Attorneys, Olympia, Washington; E. G. Toomey of Toomey & McFarland, Attorneys, Helena, Montana.

Before Chairman Carey and Commissioners O'Connell and Young at Baker, Montana

[fol. 21] By the COMMISSION:

Upon the filing of a complaint against the Mountain States Power Company charging that its rates for furnish-

ing electricity to the people of Baker were excessive, the Commission set the matter down for hearing and after due notice to the respective parties the matter was heard by the Commission. It appears that this Company in the Baker district furnished electricity to the people of Baker, Ismay, Plevna and Westmore. While the complainants are interested only in the rates in the Town of Baker, the hearing to all intents and purposes took the form of a proceeding to investigate the rates of the entire Baker district, including Baker, Plevna, Westmore and Ismay. The utility company contended that this was necessary under the laws of the State of Montana. The complainants on the other hand did not concede that the entire district must be taken as a unit. Their position was that when the utility company acquired the property now used and useful in serving the people of Baker, Baker was the only City then being furnished with electricity. That subsequent to the acquisition of the plant at Baker the Company extended the line to the other points named.

The complainants take the view that the citizens of Baker have no interest in or concern of the rates in the other places named or with the value of the property used and useful in serving the citizens of the other towns named.

The Commission does not in this proceeding feel called upon to determine the question as to whether the entire district must be treated as a unit or whether Baker may be segregated and considered alone. For the purpose of this proceeding the Commission feels justified in accepting the contention of the utility company but makes no decision as to whether it could do otherwise under the circumstances.

[fol. 22] As a part of the plant and equipment used there is situated in the Town of Baker an electric plant which was formerly used for generating electricity but which has not been in use for more than seven years. The Company contends that this standby plant is to be reckoned in valuing its property used and useful in serving the public. With this we do not agree. The Company purchases its electricity from the Montana Dakota Power Company and receives it at the Town of Baker. There is no reasonable justification for maintaining the electric plant. It is of no use to the citizens of Baker or to the citizens of the Baker district, and there is no reasonable justification for including it in the valuation of the property serviceable to the public.

The Commission on the evidence in the case concludes that a fair present value of all of the property used and useful in serving the public in the Baker district does not exceed the sum of $55,000.00. Whether it amounts to that much or not we do not now determine; certainly it does not exceed that value.

There was evidence introduced from which it is contended by complainants that there had already been taken from the earnings of this Company and its predecessors throughout the years more than sufficient by way of depreciation to return to the operator the entire investment in plant and property. Whether this is so or not, it does appear from the evidence that the Company is not entitled to more than 4% on the present value of its property used and useful in the business by way of depreciation.

The earnings of the Company in 1934 amounted to $32,263.80. The expenses of operation, including the purchase price of the electrical energy amounts to $21,420.56 without considering taxes and depreciation.

The taxes paid by the Company for the year 1934 amounted to $3,828.21.

[fol. 23] The Company claims the right to $5,344.92 by way of depreciation but the Commission believes that $2,200.00 is ample to allow by way of depreciation. If we allow but $2,200.00 by way of depreciation the Company would have a net operation revenue for the year 1934 of $4,814.93, or a return of nearly 9% on the value of its property used and useful in the service.

The Commission finds that this is in excess of a fair return, warranting a substantial reduction in the rates. There is ample evidence in the record that a reduction in the rates would have a tendency to increase consumption. The exact effect of a rate reduction cannot be forecast. It might cause no decrease in net operating revenues. We find that in the Town of Baker the Company has inaugurated a system of supplying many houses with two meters; that with the light meter there is a different rate than the appliance meter. This, of course, adds unnecessarily to the expense of equipment necessary to serve the public and we see no reasonable justification for such a system.

The Commission believes that it should order into effect the following schedule of rates to be placed into operation and given a trial for a reasonable period. If at the con-

clusion of a reasonable trial period it is believed that the rate is either excessive or inadequate to yield a fair return, further adjustment will be made by the Commission upon application.

We believe the following rates are reasonable and will afford to the utility a fair return upon the value of its property used and useful in serving the public, to-wit:

General Lighting

Effective in Baker, Ismay, Westmore and Plevna

First 25 KWH per month, 8¢ per kilowatt hour.
All in excess, 4¢ per kilowatt hour.
Minimum Bill $1.00.

[fol. 24] The Schedule "B" rate for commercial and industrial customers shall remain unchanged excepting the minimum bill is reduced from $2.00 to $1.00.

The Schedule "C" for Power:

First 100 KWH per month, 6¢ per kilowatt hour.
Next 400 KWH per month, 5¢ per kilowatt hour.
Next 1000 KWH per month, 4¢ per kilowatt hour.
All in excess KWH per month, 3¢ per kilowatt hour.

Minimum Bill $1.00 per month for power installation of 5 H. P. or less.

Minimum Bill $2.50 per month for power installation of more than 5 H. P.

An appropriate order follows:

[fol. 25] Public Service Commission of Montana

Minutes, September 13, 1935

At a session of the Public Service Commission of Montana, held in its offices of the Capitol Building, Helena, Montana, on the 13th day of September, 1935, present Chairman Carey and Commissioner O'Connell and Young, there regularly came before the Commission for action the matters and things involved in Docket No. 1435, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this Order made a part, and that all matters and things involved have been duly investigated and a public hearing had

whereat all persons interested had opportunity to appear and present their respective interests and now the Commission being fully advised in the premises,

It is therefore ordered that the Mountain States Power Company, Baker, Montana, file with this Board a revised schedule of its rates to conform with the schedules set forth in the report attached hereto and file the proposed schedules with this Commission on or before September 25, 1935, for the approval of the Commission; that the rate as thus approved will be effective on September 1st, 1935, upon motion of Commissioner Jerry J. O'Connell, seconded by Chairman Carey, motion carried by a majority vote; Commission- Young voting in the affirmative in part with the understanding that he will write an explanation and file same with this Report and Order.

It is further ordered that the Secretary shall serve a true and correct copy of this Report and Order upon the parties hereto within five days from the date hereof.

Thomas E. Carey, Chairman; Jerry J. O'Connell, Commissioner, Being and Constituting a Majority of the Board of Railroad Commissioners, ex officio Public Service Commission of Montana; Leonard C. Young, Commissioner.

Attest: Official, Albert A. Angstman, Secretary.

Commissioner Young's explanation follows:

[fol. 26] EXHIBIT "B" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana

PETITION FOR REHEARING AND STAY

Comes now Mountain States Power Company, a corporation, Respondent in the above entitled and numbered docket, and having been served on Tuesday, September 17th, 1935, with copy of Report and Order No. 1666, in said entitled and numbered docket, issued by a majority of said Commission, hereby respectfully petitions your

Honorable Commission for a rehearing and stay upon its said Report and Order No. 1666 on the following grounds:

(1) That the Report and Order is contrary to the evidence in the prescription of the rates and charges therein ordered substituted for existing rates and charges heretofore lawfully approved by said Commission.

(2) That the conclusion in the Report and Order, that the present fair value of the property of respondent used and useful in serving the public in the Baker District "does not exceed the sum of Fifty-five Thousand ($55,000.00) Dollars," is contrary to and is without support in the record of the Commission and is wholly unwarranted by the evidence.

(3) That as shown by the evidence of record in this proceeding, the reduced rates as prescribed and the application of the various elements of revenue and expense result in a wholly inadequate return of earning to respondent, upon the fair value of its property, irrespective of the inclusion or exclusion of the steam generating plant located in the town of Baker, Montana.

(4) That said report in its conclusions with respect to the value of respondent's property and in its conclusions [fol. 27] with respect to a fair return thereon, denies this respondent due process of law, confiscates respondent's property and if this respondent is not relieved therefrom, immediately impairs and must directly and inevitably ruin respondent's capacity to render reasonably adequate service in the Baker district or any service therein.

Wherefore, your respondent respectfully prays your Honorable Commission to reconsider the matter and things involved in said Docket No. 1435 above entitled and grant this respondent, and all concerned, a rehearing thereon and that pending decision of such rehearing, your Honorable Commission forthwith enter its Order completely staying and arresting the provisions of said Report and Order No. 1666 until the further Order of the Commission after completion of full proceedings on rehearing.

Done and dated this 22nd day of September, 1935.

Respectfully submitted, Mountain States Power Company, by E. G. Toomey, Cleland and Clifford, Its Attorneys. Of Counsel: Toomey and McFarland.

STATE OF MONTANA,
County of Lewis and Clark, ss:

E. G. Toomey, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Mountain States Power Company in the above entitled proceeding and that he makes this verification for and on behalf of said corporation for the reason that none of the officers thereof are at present within the County of Lewis and Clark, State of Montana; that he has read said Petition for Rehearing and knows the contents thereof and that the matters and things therein stated are true of his own knowledge.

E. G. Toomey.

Subscribed and sworn to before me this 22nd day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 10th, 1938. (Notarial Seal.)

[fol. 28] EXHIBIT "C" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana.

Order Denying Rehearing and Stay

The Petition of Mountain States Power Company for a rehearing and for a stay of the Report and Order No. 1666 in the above entitled Docket, coming on regularly for hearing, and the Commission having heard and considered the said petition and the arguments of counsel in support thereof, and being otherwise fully informed in the premises, it is now,

Ordered: That said Petition for rehearing and stay be, and the same is hereby denied.

Done and dated at Helena, Montana, this 23rd day of September, 1935.

Thomas E. Carey, Chairman; Jerry J. O'Connell, Commissioner; Leonard C. Young, Commissioner, Being and Constituting the Board of Railroad Commissioners of the State of Montana, ex Officio Public Service Commission of Montana.

Attest: Official Albert H. Angstman, Secretary.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN FORD—Filed September 25, 1935

STATE OF MONTANA,
County of Lewis and Clark, ss:

John Ford, being first duly sworn on oath, deposes and says:

I make this affidavit in support of the application of the complainant for a preliminary restraining order of the Report and Order No. 1666 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I am now, and have been for the past three years, Assistant Secretary of Mountain States Power Company, a corporation. I was for several years prior to my selection in that position a member of the accounting staff of said corporation. I am familiar with the books, records and accounts of the corporation and exercise supervision of the detail of all accounting matters with respect to the corporation's accounts including such accounts applicable to the Baker District in Montana.

The books, records and accounts of Mountain States Power Company and with respect to the operations of that company in the State of Montana are kept in accordance with the classification of accounts prescribed by the Public Service Commission of Montana. I was personally present at the hearing before the Public Service Commission of Montana at Baker, Montana commencing on March 14, 1935, involving the valuation and rates of the company in the

Baker District. I am familiar with the Bill of Complaint filed herein and the description of plant, equipment, facilities and the character and nature of operations of the company in the so-called Baker District are substantially as set forth therein. The Baker District is treated as a separate [fol. 30] operating and accounting unit of the corporation.

At said hearing before said Commission, I was a witness on behalf of the company and presented as Exhibit No. 25, a detailed statement by accounts of the company's investment in electrical property in the Baker District. That Exhibit was prepared and showed the investment in the various primary classifications of property such as land, structures, boiler plant equipment, engines, electric plant, power plant equipment, substations, poles, towers and fixtures, overhead conductors, electric services, transformers, meters, street lighting equipment, office equipment, stores equipment, tools, transportation equipment, laboratory equipment and the cost of plant purchased.

As shown by that exhibit which was offered and received in evidence and supported by oral testimony, the book cost of the company's electrical property in the Baker District was, as of December 31, 1934, the sum of $152,712.01.

As further disclosed by said exhibit the company invested in net additions to the plant in this district during the period from October 1, 1926, to December 31, 1934, the sum of $70,595.00.

Exhibits and supporting testimony were likewise presented before said Commission at said hearing showing the cost of reproduction new and cost of reproduction new less accrued depreciation of the electrical property of the company in the Baker district as of December 31, 1934. As disclosed by those Exhibits and said supporting testimony, the cost of reproduction new of said property as of said date was $156,166.00 and the cost of reproduction new less accrued depreciation was $137,686.00.

The book cost of property as above stated of $152,712.01 is cost of physical property only and does not include any allowance for working capital and material and supplies and only a part of the going concern value. The amounts shown above for reproduction cost new and reproduction [fol. 31] cost new less accrued depreciation do contain allowances for working capital and material and supplies and going concern value.

No proof was offered or received by the Commission with respect to the elements of reproduction cost new and reproduction cost new less accrued depreciation except as introduced by the company's witness and by me as above referred to.

In addition to the book cost of property as submitted by me to the Commission, there was offered by counsel for the Baker Civic League and received in evidence as Exhibit No. 1 in said hearing, a detailed report and audit of the company's books and records with respect to its electric property and operations in the Baker District. This report and audit, Exhibit No. 1, was made by Mr. R. D. Miller, the official Auditor of the Public Service Commission of Montana in 1933. This report and audit, Exhibit No. 1, so made by the Commission's representative, disclosed that the conclusions arrived at in said Report and audit were the result of a detailed examination of the company's books, records and accounts and even the individual vouchers.

The report and audit, Exhibit No. 1, contains a summary entitled "statement showing amount invested in property and plant" in the Baker District during the years 1926 to July 31, 1933 and a total shown therein is $152,697.78.

Evidence was introduced before the Commission at said hearing and the record before said Commission discloses that the assessed value of the company's electric property in Fallon County, Montana (a portion of the Baker District) was as of the last taxing date the sum of $94,242.00. This amount was and is used by the taxing authorities of the towns, county and state as the basis for the levy and collection of taxes from the company in that portion of the Baker District represented by Fallon County. The Baker District also includes a portion of Custer County, Montana [fol. 32] and the company has certain of its Baker District property in said Custer County. The record with respect to the assessed value of the company's electrical property in said Custer County was not available and was not presented to the Commission at the hearing.

The Public Service Commission of Montana by its Report and Order No. 1666 found the value of this same property in the Baker District to be presumably as of December 31, 1934, the sum of "not to exceed $55,000.00". In my opinion this valuation so fixed by the Commission is clearly inadequate, unfair and unlawful and will result when applied by

the Commission in the making of rates or otherwise, in the confiscation and taking of the company's property.

Since the book cost of the company's property is as indicated above, $152,712.01, it will become necessary if said valuation of $55,000.00 is sustained, to amortize out of the fixed capital accounts of this company, the difference between said amounts, or $97,712.01. Assuming such amortization should be accomplished within a period of ten years, this will mean that the company would have to write off and retire approximately $9,700.00 per year of its plant. Since the revenues under existing rates are insufficient to return to the company this amount, and since the Commission has ordered a material reduction in the rates of the company, the company if forced to accept said Commission valuation and rate reduction will be operating at a loss of approximately $15,000.00 per year.

Considering the reductions ordered by the Commission in three of the schedules of the company, the average reduction in rates ordered, is approximately 32%.

The application of said reduced rates and charges will, on the basis of the 1934 business of the company, reduce its annual gross electric revenue of $32,263.80 under existing rates to $23,146.80 under the reduced rates,—or an annual reduction of $9,117.00.

[fol. 33] Under existing rates and on the basis of 1934 business, the net return to the company in the Baker District does not exceed 1.49% upon a rate base or a value of $137,686.00. Said rate base or value as here used being the cost of reproduction new less accrued depreciation.

Under existing rates and on the basis of 1934 business, the net return to the company in the Baker District does not exceed 2.55% upon a rate base or value of $113,580.38. Said value or rate base as here used of $113,580.38 being the book value of the company's electric property in the Baker District with the steam generating plant at Baker eliminated.

If the reduced rates as ordered by the Commission are applied to the cost of reproduction new less accrued depreciation of $137,686.00, the company will sustain a loss in revenue of $7,062.67 per year. Applying the reduced rates as ordered by the Commission to said book value less steam plant, ($113,580.38) the company will sustain an actual loss of $6,225.26. By the use of the term "loss" is meant that the company will fail to earn anything for return by the

amounts shown; in other words, these latter figures of $7,062.67 and $6,225.26, are red figures.

Upon this basis and without any allowance for depreciation, the company's expenses would exceed the annual gross electric revenue by more than $2,000.00 per year.

Giving effect to the reduced rates as ordered by the Commission and using the Commission's valuation of $55,000.00, the company would be required to operate at an actual loss of $4,433.24 in addition to the $9,700.00 per year lack of earnings with respect to amortization of its property.

A summary of the elements of fair value, which were before the Commission in its said proceeding and docket No. 1435, and which it patently ignored in arriving at its conclusion as to fair value, are as follows:

[fol. 34] (a) Reproduction cost new as of Dec. 31, 1934 (Exhibit #32) $156,166.00

(b) Reproduction cost new, less accrued depreciation as of Dec. 31, 1934 (Exhibit #33) 137,686.00

(c) Book cost (Company Exhibit #25) as of Dec. 31, 1934, (exclusive of Working Capital, material and supplies, and approximately 50% of going value) 152,712.01

(d) Assessed value, for taxing purposes, in Fallon County, Montana, only (Exhibits #20-21) 94,242.00

(e) Book Cost, as determined in 1933 by the Commission's own Auditor, (Exhibit No. 1) 152,697.78

(f) Book value, as per company testimony, as of Dec. 31, 1934, with the steam generating plant eliminated 113,580.38

Although there was no substantial controverting evidence offered by the Baker Civic League or the Commission, or any other party, and no comparable studies or exhibits, the Commission concluded in its Report and Order No. 1666 that the fair value of this property "did not exceed" $55,000.00.

Under the requirements of the Commission's Report and Order No. 1666 the reduction in rates ordered by it is made effective as of September 1, 1935. Therefore if the company is required to accept the Commission's valuation of

$55,000.00 and the reduced rates, the company has been, since September 1, 1935, sustaining a daily actual operating loss of approximately $41.00, and will continue to sustain such daily loss for a period of at least ten years.

Applying the reduced rates as ordered by the Commission to the cost of reproduction new less accrued depreciation, of $137,686.00, the company has, since September 1, 1935, and will continue indefinitely to sustain a daily actual operating loss of $19.00.

The daily losses above referred to are exclusive of any [fol. 35] allowance for return. In other words, if the reduced rates are applied as indicated, the company will fail to earn any return and will sustain an additional daily loss in the amounts shown.

John Ford.

Subscribed and sworn to before me this 24th day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana; Residing at Helena, Montana. My commission expires March 10, 1938. (Notarial Seal.)

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HOWARD F. LILL—Filed September 25, 1935

STATE OF MONTANA,
County of Lewis and Clark, ss:

Howard F. Lill, being first duly sworn on oath, deposes and says:

I make this Affidavit in support of the application of the Complainant Company for a preliminary restraining Order of the Report and Order No. 1666 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I graduated from the University of Indiana with a Degree in electrical engineering in the year 1917. I have followed and practised that profession continuously since my graduation. I have had in the neighborhood of fifteen years of valuation work. The first four years were mostly

in the valuation of industrial properties and the next eleven or twelve years were spent in inventorying and valuing utility properties, including electric, gas, water, steam heat, street railway and railroads. I have inventoried and appraised public utility properties in nearly every state in the Union and in Canada and Mexico and would say that the reproduction cost of the properties so appraised by me in that time has been between $500,000,000.00 and $600,000,000.00. My qualifications as a valuation and appraisal engineer were not questioned at the time of the hearing hereinafter referred to, in fact, they were admitted by the Attorney for the Baker Civic League.

I was personally present at the hearing before the Public Service Commission of Montana at Baker, Montana commencing on March 14, 1935, involving the valuation and rates of Mountain States Power Company in the Baker District. I am familiar with the Bill of Complaint filed herein and the description therein of plant, equipment, [fol. 37] facilities and the character and nature of operations of the company in that District are substantially as set forth in the Bill of Complaint. The Baker District is treated as, and is in fact, a separate operating unit of the company and is not physically connected with any other electrical property of the company.

At said hearing before the Commission I was a witness on behalf of the company and presented certain exhibits, including Exhibits 32 and 33 of the record before the Commission. Exhibit No. 32 submitted to the Commission, was a detailed inventory and appraisal of the company's electrical property located and operated in the Baker District. This inventory and appraisal were prepared by me in detail and with considerable care and in my opinion correctly record the list of items of property therein referred to and correctly reflect the unit prices and the totals shown therein.

In my opinion the reproduction cost new as of December 31, 1934, of the company's electrical property in the Baker District was $156,166.00, including working capital, material and supplies and going concern value. As shown by my inventory and appraisal the value of the physical property was as of said date $136,747.00.

Exhibit No. 33 offered and received in evidence in the said proceeding before the Commission was a study and tabulation showing the cost of reproduction new less accrued depreciation of the company's electrical property in

the Baker District. In my opinion the amount shown therein for this element of value, $137,686.00 is a fair and correct statement of such value. The depreciated condition of the property was determined by me by an inspection in the field of the various units of property. The reproduction cost new less accrued depreciation of the physical property alone as shown in my said report was $118,267.00.

My said exhibits and supporting and explanatory testimony were the only exhibits and testimony offered and received in evidence in the proceeding before the Commission [fol. 38] with respect to the elements of reproduction cost new and reproduction cost new less accrued depreciation. No comparable or other similar studies were presented by any party or person.

Reference is made in the Commission's Report and Order No. 1666 to the steam generating plant of the company at Baker, Montana and contention was made at the time of the hearing particularly by the Baker Civic League that said steam plant should be eliminated from the valuation. If said steam plant were eliminated from consideration in determining the value of this property, the amount heretofore stated with respect to reproduction cost new and reproduction cost new less accrued depreciation would be reduced. With the steam plant eliminated the cost of reproduction new as of December 31, 1934, would be $123,793.00 and the cost of reproduction new less accrued depreciation would be $116,017.00.

Howard F. Lill.

Subscribed and sworn to before me this 24th day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 10, 1938. (Notarial Seal.)

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—Filed October 7, 1935

Whereas, it appears to the Court from the duly verified Bill of Complaint, the Exhibits attached thereto and the

Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that the Public Service Commission of Montana has issued and rendered a Report and Order Numbered 1666—Docket No. 1435, entitled: "In Re: Application of The Baker Civic League of Baker, Montana for an order readjusting the electric light and power rates charged by Mountain States Power Company at Baker, Montana" wherein said Public Service Commission of Montana has promulgated and ordered enforced a certain schedule of rates and charges for electric service in Baker, Ismay, Westmore and Plevna, Montana, commonly referred to as the Baker District, effective September 25, 1935; and,

It appears that if the complainant, the Mountain States Power Company, is required to sell and distribute electric energy under and in accordance with said Report and Order, said Complainant will be required to operate at a loss and will each day sustain and suffer substantial, irreparable and continuing loss and damage, as is more fully set forth in the Bill of Complaint filed in the above entitled cause, and in said Affidavits, to which reference is hereby made for greater particulars; and

It appears from the said Bill of Complaint, Exhibits attached thereto and Affidavits filed in support thereof, that the requirements, terms and provisions of said Report and Order are unlawful, unjust and confiscatory; and

It appears that there is danger that substantial, irreparable loss and damage would result to the Complainant herein before a hearing on the said application for interlocutory injunction, and that the imminent application of [fol. 40] the rate reductions ordered by the defendant, Public Service Commission of Montana, in said Report and Order is prima facie immediately and daily confiscating the property of the complainant herein, and that the rights of the defendants and all others interested or directly affected by said Report and Order, including the customers of said Complainant, can be fully protected by requiring Complainant to impound the amounts collected by it from each of its customers under existing schedules in the Baker District in Montana in excess of the rates prescribed or allowed by the said Defendant Commission in its said Report and Order No. 1666, and that in the event the rates prescribed by said Defendant Commission in said Report and Order

should be adjudged to be valid, the excess over said prescribed rates collected by the Complainant shall be returned to the said customers from whom collected, and that the power of this Court should be used to accord prompt relief in the premises; and

It appears that if this Court does not immediately and forthwith issue a temporary restraining order, preliminary to a hearing before this Court, in the above entitled cause, a multiplicity of suits and actions will result, as is more fully set forth — Bill of Complaint on file herein, to which reference is made for greater particulars; and

It appears that this Complainant has no plain, speedy and efficient remedy at law or in equity in the Courts of the State of Montana; and

It appears from the duly verified Bill of Complaint, the Exhibits attached thereto and the Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that a temporary restraining order, preliminary to a hearing, is proper, justified and required to prevent such substantial, irreparable loss and injury and damage and to prevent a multiplicity of suits and actions, and that the power of this Court should be exercised by the issuance and granting of such restraining order;

[fol. 41] It is Ordered that the Defendants and each of them appear before the above entitled Court in the courtroom of said Court in the Federal Building in the City of Missoula on the 8th day of October, 1935, at the hour of 10:00 o'clock A. M., and then and there show cause, if any they have, why an interlocutory injunction should not issue and continue in force until such final hearing on the said Bill of Complaint; and

It is Further Ordered that Complainant's application and prayer for a temporary restraining order shall be, and it is hereby granted, and the defendants, and each of them, and all persons acting in aid or assistance of said defendants, or their successors in office, be, and are hereby, restrained and enjoined from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the

Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges: (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules, and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

It is Further Ordered that said Complainant shall monthly deposit with the Clerk of this court any and all sums of money by it collected from its customers in the Baker District in Montana in excess of the rates and charges prescribed by the said defendant Commission, in its said Report and Order No. 1666, from and after September 1st, 1935, until the further order of this Court, said sums so impounded to be by the Court ordered refunded to the customers from whom collected, pending the operation of this order or any further order of impound-
[fol. 42] ment herein, in the event that the said Report and Order shall be finally adjudged valid; and

It is Further Ordered that this temporary restraining order shall be effective upon the filing with the Clerk of the above entitled Court of a bond conditioned in conformity with this order, in the sum of Ten Thousand dollars ($10,000) Dollars.

It is Further Ordered that a copy of this order, certified under the hand of the Clerk and the Seal of the above entitled Court, be served on each of the defendants to be restrained thereby and upon the Governor of the State of Montana and upon the Attorney General of the State of Montana, at least five (5) days before the date fixed for said hearing;

Dated this 25th day of September, 1935.

Charles N. Pray, United States District Court Judge.

Attest: C. R. Garlow, Clerk, by C. G. Kegel, Deputy. (Seal.)

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that on the 25th day of September, 1935, at Great Falls, Montana, I received the within Order to Show Cause and Temporary Restraining Order,

and on the 26th day of September, 1935, at Great Falls, Montana, I personally served the Public Service Commission of the State of Montana by exhibiting to Thomas E. Carey, Chairman of said Public Service Commission of Montana, the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of [fol. 43] said original Order to Show Cause and Temporary Restraining Order; further, that I also personally served Jerry J. O'Connell and Leonard C. Young, as members of said Public Service Commission of the State of Montana at Great Falls, Montana, on the 26th day of September, 1935, by exhibiting to each of them the original Order to Show Cause and Temporary Restraining Order, and by delivering to each of them a copy of said original Order to Show Cause and Temporary Restraining Order; further, on the 27th day of September, 1935, at Baker, Montana, I personally served Al Hansen, as County Attorney of Fallon County, Montana, by exhibiting to him the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said original Order to Show Cause and Temporary Restraining Order; further, that I also, on said 27th day of September, 1935, served The Baker Civic League of Baker, Montana, at Baker, Montana, by exhibiting to M. L. Schneider, as Secretary of The Baker Civic League of Baker, Montana, the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said Order to Show Cause and Temporary Restraining Order; further, that on the 28th day of September, 1935, at Miles City, Montana, I personally served Rudolph Nelstead, as County Attorney of Custer County, Montana, by exhibiting to him the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said Order to Show Cause and Temporary Restraining Order.

Sid A. Willis, U. S. Marshal, by W. W. Crawford, Deputy.

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that on the 26th day of September, 1935, I received the within order to show cause and temporary restraining order, and on the said 26th day of September, 1935, I personally served the same on Frank H.

[fol. 44] Cooney as Governor of the State of Montana, and Raymond T. Nagle as Attorney General of the state of Montana, and each of them, in the City of Helena, County of Lewis and Clark, State and District of Montana, by delivering to each of them a copy of said order to show cause and temporary restraining order.

Sid A. Willis, United States Marshal, by E. Lieberg, Deputy.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO QUASH ORDER TO SHOW CAUSE—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dissolve the Temporary Restraining Order and to Quash the Order to Show Cause entered herein on the 25th day of September, 1935, on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint and upon the affidavits in support of the Temporary Restraining Order, this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court for equitable or any relief.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana. Al Hansen, County Attorney, Fallon County, Montana.

Service of the foregoing Motion admitted this 8th day of October, 1935.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dismiss the above-entitled action and to dismiss the complaint filed therein on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana. Al Hansen, County Attorney, Fallon County, Montana.

Service of the foregoing Motion to Dismiss admitted this 8th day of October, 1935.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 1522, Montana Power Company vs. Public Service Commission of Montana, et al.

No. 3003, Mountain States Power Company vs. Public Service Commission of Montana, et al.

No. 3004, Mountain States Power Company vs. Public Service Commission of Montana, et al.

These three causes came on regularly for hearing this day before the court of three Judges, consisting of Honorable Bert E. Haney, United States Circuit Judge, and Honorable Charles N. Pray and Honorable James H. Baldwin, United States District Judges.

Case No. 1522, Montana Power Company vs. Commission, et al., was duly called for hearing on the motion and application of complainant for an interlocutory injunction, duly filed, and on defendants' motion to dismiss the complaint, this day filed herein.

Mr. William L. Murphy, Mr. J. T. Finlen, Jr., and Mr. J. E. Corette, Jr., appeared for the complainant and Mr. A. H. Angstman appeared for the defendants. Mr. Albert Besancon appeared as amicus curiæ in behalf of the water users of Missoula County.

Case No. 3003, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, to dismiss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainants and Mr. A. H. Angstman and Mr. Al Hansen appeared for the defendants.

Case No. 3004, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, [fol. 48] to discuss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainant, and Mr. A. H. Angstman and Mr. F. F. Haynes appeared for the defendants.

Mr. Walter T. Bleick and Mr. Jos. Flaherty acted as court reporters.

Thereupon, on motion of its counsel, the complainant in case No. 1522, Montana Power Company vs. Commission, et al., was granted leave to amend its complaint, by interlineation, as follows: on page 20, line 15, change the figures $148,332.57 to $101,204.00, and on page 20, line 30, change the figures $1,287,792.00 to $1,278,792.00.

Thereupon counsel for complainant in said cause filed and presented to the court an affidavit in triplicate, correcting certain figures in the affidavits of F. M. Kerr and

J. R. Thomas heretofore filed therein; and in said cause counsel asked that the record show that the complainant now presses, reiterates and renews its motion and application for interlocutory injunction.

Thereupon, by agreement of all parties, expressed in open court, and it appearing that the same or like questions are involved in all three of said causes, court directed that they be heard and presented together at this time.

Thereupon said causes were duly heard, argued and submitted, and by the court taken under advisement, each side being granted twenty days in which to prepare, serve and file written arguments and briefs, such time to run concurrently.

At the close of his argument, Mr. Angstman, counsel for the defendants, asked that said defendants, in the event it becomes necessary, be granted ten days after final decision in which to answer, and it was so ordered.

Mr. Besancon, for the water users, requested that, in the event the court retains jurisdiction, he be allowed to intervene and file an answer in case No. 1522, Montana Power [fol. 49] Company vs. Commission, et al., when heard upon the merits.

Entered in open court at Missoula, Montana, October 8, 1935.

C. R. Garlow, Clerk.

[fol. 50] IN UNITED STATES DISTRICT COURT

Before Haney, Circuit Judge, and Baldwin and Pray, District Judges

MEMO DECISION—Filed February 3, 1936

PRAY, District Judge:

The foregoing suits in equity were brought to enjoin the enforcement of orders issued by the Public Service Commission of Montana, reducing the rates and charges fixed by complainants on the sale and distribution of natural gas, water and electricity on the ground that such reduction amounts to a taking of their property without due process of law, in violation of the federal constitution. Temporary restraining orders and orders to show cause

why interlocutory injunctions should not be granted, were issued.

The question at this time for our consideration arises on the motions to dismiss in all three cases for lack of jurisdiction. These motions were heard by the said Court at Missoula, on October 8th, 1935. Oral arguments were made and briefs submitted by counsel for the respective parties. Subsequent to the hearing and before the Court had passed upon the motions to dismiss, the complainant Montana Power Company and the defendant Public Service Commission came to an agreement as to the rates and charges to be adopted and entered into a stipulation for the dismissal of this case and submitted a form of order to carry it into effect, which has been approved and signed by all the Judges of said Court. The other two cases are still pending on the motions to dismiss. The legal questions involved in these motions are like those before a three Judge Court convened at Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same [fol. 51] grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said Court on Nov. 20th, 1935, in which all three Judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (Montana Power Co. v. Public Service Com., No. 1506, Butte Water Co. vs. Public Service Com., No. 1513, Fred A. Horning v. Public Service Com., No. 1514.)

Wherefore, having fully considered the questions in issue, and being duly advised, and good cause appearing therefore, the motions of the defendants to dismiss the two remaining suits for lack of jurisdiction are hereby granted.

All concur.

[File endorsement omitted.]

[fol. 52] OPINION BY THREE-JUDGE COURT

The Opinion of November 20, 1935, by Three-Judge Court, referred to and adopted in the Memo Decision next preced-

ing, is the opinion in Montana Power Co. v. Public Service Commission of Montana, et al, now reported in 12 Federal Supplement, 946.

[fol. 53] IN UNITED STATES DISTRICT COURT

APPLICATION FOR STAY PENDING APPEAL—Filed February 5, 1936

To the Honorable the Judges of the Above-entitled Court in the Above-entitled Cause:

Complainant hereby advises that it intends to appeal to the Supreme Court of the United States from the decree to be entered in this cause, in accordance with the decision herein, and hereby makes application for an order continuing the restraining order heretofore issued in said cause in force for a reasonable time, not exceeding thirty (30) days after the entry of said decree, within which to take and perfect said appeal, and further continuing said restraining order in force after said appeal is taken pending the hearing and decision of said case on said appeal by the Supreme Court of the United States, and that the decree to be entered herein provide accordingly; conditioned, if the court require, upon continuation of the impoundment heretofore ordered, established and in operation herein and continuance of the bond in the sum of Ten Thousand ($10,000.00) Dollars heretofore filed herein and supporting said impoundment "during the pendency of said temporary restraining order and the further order of the court in the above entitled cause", as in said bond recited, or such additional or other bond conditioned in such terms and in such sum as the court may order herein.

Complainant, by its solicitors, in support of said application, hereby represents and states that, unless said application is granted and said restraining order continued in force, the complainant will suffer irreparable injury as appears from the complaint in said cause on file herein.

Respectfully submitted, Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. [fol. 54] Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 3003, Mountain States Power Company vs. Public Service Com., et al.

No. 3004, Mountain States Power Company vs. Public Service Com., et al.

The above entitled causes came on regularly for hearing this day on application of plaintiff for stay pending appeal, Mr. E. G. Toomey and Mr. Hance H. Cleland appearing for the Plaintiff in each case, and Mr. F. F. Haynes appearing for the defendants.

Thereupon Mr. John Ford was sworn and testified for plaintiff, and the court after hearing the arguments of counsel for each side, ordered the matter submitted, each side being granted ten days for briefs.

Entered in open court at Great Falls, Montana, March 6th, 1936.

C. R. Garlow, Clerk.

[fol. 56] IN UNITED STATES DISTRICT COURT

ORDER DISSOLVING INJUNCTION AND DENYING MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL—Filed April 9, 1936

This court has heard and considered the application for a stay order pending appeal in the above entitled causes, and likewise the evidence and briefs submitted. We have heretofore concurred in an opinion filed herein that this court is wholly without jurisdiction and have ordered the dismissal of said causes for that reason, and have endeavored to point the way to a plain, speedy and efficient remedy in the State Courts. No effort has been made on the part of complainants to avail themselves of the remedy proposed by this court that has come to our attention. If the court were now to grant the stay requested the operation of the decree of dismissal would be postponed for a year or more, and to that extent would be of no avail and would result in continuing the injunctive relief which we have heretofore denied for the reason that this court was without jurisdic-

tion to grant it in the first instance. The practical effect would be to nullify the decree of dismissal for lack of jurisdiction. The court does not consider the grounds alleged of such pressing importance as to warrant the continuance of the injunction, and, accordingly, good cause appearing therefor, the injunction aforesaid is hereby dissolved and the motion for a stay of proceedings pending appeal is denied.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

DECREE—Filed April 9, 1936

This cause came on to be heard on the 8th day of October, 1935, and was argued by counsel for the respective parties and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the motion of the defendants to dismiss for lack of jurisdiction should be granted.

Wherefore, it is ordered, adjudged and decreed that the said action and the Bill of Complaint therein filed be, and the same hereby are dismissed and that defendants have judgment for their costs herein incurred in the sum of — Dollars.

Dated this 9th day of April, 1936.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed April 17, 1936

To the Honorable the Statutory Three-Judge Court Herein, and to the Honorable Judges Thereof:

Considering itself aggrieved by the final Decree of Dismissal rendered and entered in the above entitled cause on

the 9th day of April, 1936, by the statutory court of three Judges convened herein, Mountain States Power Company, a corporation, complainant herein, hereby does appeal from said decree to the Supreme Court of the United States and prays that an order allowing appeal be entered herein and for an order fixing the amount of the bond thereon, and that citation be issued as provided by law and that a transcript of the record, proceedings, testimony and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, Washington, D. C., under the rules of said court in such cases made and provided.

ASSIGNMENT OF ERRORS

And the said Mountain States Power Company, complainant, assigns errors and abuses of discretion by said court in the record and proceedings in said cause as follows:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in [fol. 59] equity" in its courts within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code Section 24, 28 U. S. C. A. Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the state statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

PRAYER FOR REVERSAL

For which errors and abuses of discretion, the complainant prays that the said decree of the three-Judge statutory court dated April 9th, 1936, be reversed and a judgment ordered in favor of complainant directing said court to entertain jurisdiction of said cause on application for interlocutory injunction on the merits, and for costs.

Done and dated April 17, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. Toomey, John W. Chapman, [fol. 60] of Helena, Montana.

Service of the foregoing Petition for Order of Appeal, Assignment of Errors and Prayer for Reversal and receipt of a true copy of each thereof on April 18th, 1936, is hereby acknowledged this 18th day of April, 1936.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 17, 1936

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final Decree of Dismissal made and entered on the 9th day of April, 1936 in

the above entitled suit by the three-Judge statutory court convened herein, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and, separately, Statement Particularly Disclosing the Basis of Appellate Jurisdiction in the Supreme Court of the United States to review the decree in question, pursuant to the statutes, and the rules of the Supreme Court of the United States, in such cases made and provided and it appearing that there was drawn in question the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Baker, Montana, district, and ordering reductions in the company's rates for electric service, and preliminarily the question of whether the State of Montana affords complainant a plain, speedy and efficient remedy in its courts, within the meaning of the Johnson Act, (Act of Congress, May 14, 1934; 48 Stat. 775; Chapter 283, 28 U. S. C. A., Section 41, (1) in the presence of Section 3906, Revised Codes, Montana, 1921) and that such petition is a proper petition for the issuance of an order allowing appeal:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the final Decree of Dismissal of the three-Judge statutory court specially convened in the United States District Court for the District of Montana in this cause, as provided by law.

[fol. 62] It is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, testimony, proceedings, decree, stipulations, etc. in this cause and transmit the same to the Supreme Court of the United States as required by law and the rules of said court.

It is further ordered that the appellant, Mountain States Power Company, execute to the respondents, its bond with surety to be approved by the undersigned in the sum of One thousand dollars ($1,000) Dollars as security for costs on appeal and to be conditioned according to law.

Done and dated this 17th day of April, 1936.

Charles N. Pray, Judges.

[File endorsement omitted.]

[fols. 63-65] Bond on appeal for $1,000.00, approved and filed April 17, 1936, omitted in printing.

[fols. 66-69] Citation, in usual form, showing service on Raymond T. Nagle et al., filed April 18, 1936, omitted in printing.

[fol. 70] IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE ON APPLICATION FOR STAY—Filed April 25, 1936

Be it Remembered, that the application by complainant for stay of entry of decree, and for stay after entry of decree pending appeal to and in the Supreme Court of the United States by complainant from the decree of dismissal entered herein, came on regularly for hearing on the 6th day of March, 1936, Honorable Charles N. Pray, one of the Judges of the three-Judge court herein, presiding, Hance H. Cleland of Olympia, Washington, and E. G. Toomey of Helena, Montana, appearing as counsel for complainant, and Al Hansen, of Forsyth, Montana, appearing as counsel for defendants, and thereupon the following proceedings were had and done, and the following evidence received:

COLLOQUY

The Court: Are you ready to proceed in this matter, gentlemen?

Mr. Toomey: We are, Your Honor, at this time. The decision, as your Honor knows came down February 3rd, and on February 5th the Complainant filed application for a stay, and your Honor subsequently notified us that the application was referred to the other members of the special Court.

This morning has been set for taking proof and any argument which the Court might desire in connection with the application.

The Court: This is the application for a stay.

Mr. Toomey: Yes, your Honor.

The Court: On your application showing any reasons you may have which you think are sufficient to entitle you to a

stay. Have you any officer or some person who can tell the circumstances? I would——

Mr. Toomey: Yes, I would like to have those witnesses offer testimony through Mr. Cleland whom I heretofore presented to the Court as counsel in this case.

[fol. 71] The Court: Judge Haney, one of the members of the Court will be here on a three Judge Court next week, Tuesday or Wednesday, and a few days ago he mentioned this matter. He said, I wish you could dispose of it while I am up there; as long as we are involved in this hearing I did not like to postpone this and make you come again; it would make it very inconvenient. I thought perhaps you might take the testimony this morning and have it transcribed and then when Judge Haney comes we can consult together about it. You may proceed, gentlemen:

JOHN FORD, a witness called and sworn on behalf of complainant, testified as follows:

My name is John Ford; I am Assistant Secretary of the Mountain States Power Company, the complainant in this case. I was a witness in the hearings before the Public Service Commission in both the Baker and Forsyth cases. I am familiar with the books of record and accounts of the Mountain States Power Company, and with the Commission's orders as to valuations and rates in the Baker case and in the Forsyth case. I am referring to the Baker case alone. The Baker system is located in Fallon and Custer Counties, Montana, and serves the towns of Baker, Ismay and Plevna. It is not physically connected with the other company property, and it is operated as a separate and distinct system, and all records are maintained separately in this district, separate and apart from all records of the rest of the company's property. The books, records and accounts of the company are kept in accordance with the official classification of accounts as prescribed by the Public Service Commission of Montana, and this is true with respect to the Baker district.

The following valuations were presented at the Commission hearing on the Baker, Montana, property. The book cost as of December 31, 1934, exclusive of working capital, [fol. 72] materials and supplies, and approximately some 50% of going valuation was $152,712.00. The book cost as determined by the Commission's own auditor in 1933 was

$152,697.00. The book cost including going valuation, working capital, materials and supplies, but with the steam plant eliminated, was $113,580.00. The reproduction cost, new, as of December 31, 1934, which was based on a detailed inventory and appraisement, $156,166.00. Reproduction cost less depreciation as of December 31, 1934, $137,686.00. The assessed valuation for tax purposes for the year 1935, I use the year 1935 because at the Commission's hearing, only Fallon County was mentioned with a valuation of $94,242.00, whereas the assessed valuation for the entire system in the Baker district is $106,307.00. The valuation as found by the Commission and as stated in their order is an amount "not to exceed $55,000.00". In other words, the valuation of the Commission was approximately one-half of the company's assessed valuation for tax purposes.

Had the existing, or old rates, continued in force throughout the entire year 1935 in the Baker district, the gross revenue would have been $35,194.00. The operating expenses in the Baker district for the year 1935 were $36,001.00, resulting in a deficiency in red figures of $807.00; a net loss instead of a net income. That was the situation under the rates which were in effect before the Commission's order was made. There would be no return. There would be a return of .32 of one per cent on the assessed valuation for tax purposes in the red.

The rate of return on reproduction cost less depreciation, as of December 31, 1934, would be .59 of one per cent in the red.

If the reduced rate had been in effect during the entire year, 1935, the gross revenue would have been $23,868.00. That would have been a reduction in revenue of $11,326.00. Expressed in terms of percentage, this reduction would be 32.18%. As I testified, the operating expenses for the [fol. 73] Baker district during the year 1935 were $36,001.00, and the gross revenue under the new rate would be $23,868.00, resulting in a deficit of $12,133.00. In other words, the gross revenue would be less than the amount of operating expenses by $12,133.00.

There are 769 customers in the Baker District as of December, 1935. The average difference in customers bills per year as between the existing or old, and the reduced rates, including power customers and other large customers, would be $14.74 per customer per year. That would be an average difference to customers of $1.23 per month.

The reductions to the company would be $11,326.00 per year, or $944.00 per month, or $31.00 per day.

The old, or existing rates, have been in effect since April first, 1929, when they were put into effect by order of the Commission.

The company has impounded in this court, for the Baker district, the amount of $4,955.94. If we are denied a stay the company would, in order to comply with the decree, have to refund this amount, $4,955.94, and forego $944.00 per month, or $31.03 per day. In addition to this loss of earnings the company would have to amortize approximately $9,700.00 per year for ten years in order to charge off the books the difference between the Commission's valuation and the book cost. If denied the stay, the company would have to refund the impounded money to 769 different customers, in comparatively small amounts. Assuming that the company was successful in its appeal, in my opinion it would not be possible or practical for the company to recover the refunds from 769 customers, for various reasons; one, people are constantly moving away out of the system. Two, there would be such a multiplicity of suits for such small amounts that it would be impractical. Three, public relations would be entirely destroyed. Four, the expense of approximately 769 suits for small amounts would be prohibitive, and the company, indeed, as a whole, would [fol. 74] in my opinion, be insane to even attempt such a procedure as to attempt to recover the small amounts from approximately seven hundred sixty nine customers. In other words, it would be suicidal for the company to undertake to recover the considerably small amounts from such a large number of customers.

Mr. Cleland: I think, your Honor, we have covered the situation as we see it.

Mr. Haynes: No cross examination.

The Court: I see your point. You better make an argument, and have it taken down for the record.

Wherefore, complainant and appellant prays that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full and complete statement of all evidence taken and given on the ap-

plication for stay, for use on complainant's appeal to the Supreme Court of the United States.

Done and dated this 18th day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Counsel for Appellants.

Lodged with Clerk April 20, 1936. C. R. Garlow, Clerk.

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT

STIPULATION APPROVING STATEMENT OF EVIDENCE—Filed April 22, 1936

It is hereby stipulated and agreed, by and between the undersigned, Solicitors and Attorneys of record for complainant and appellant, and the undersigned, Solicitors and Attorneys of record for defendants and appellees, that the proposed statement of evidence on application for stay, lodged with the clerk of the above entitled court on April 20th, 1936, by the complainant, is agreed to as a correct statement under paragraph B of equity rule 75, and, further, that the said statement may be approved by the above entitled court, or a Judge thereof, without further notice.

Done and dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Solicitors and Attorneys for Defendants.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE—Filed April 25, 1936

On this 25th day of April, 1936, came on for consideration the matter of the approval of the Statement of Evidence lodged herein by complainant and appellant on April 20th, 1936, and it appearing to the Court that the ten days' notice of the Lodgment and of the hearing on complainant's application for Approval of said Statement has been given to defendants and their counsel as required by Equity Rule Seventy-Five (75); and it further appearing that the parties have heretofore filed herein their written stipulation agreeing that said Statement of Evidence is a correct Statement under said rule and may be approved without further notice;

It is ordered by the Court that the said statement of evidence on application for stay be, and the same is hereby approved as part of the record herein, for the purpose of complainant's appeal to the Supreme Court of the United States.

April 25, 1936.

Charles N. Pray, Judge.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Filed April 23, 1936

Upon the stipulation of the parties and the facts requiring:

It is ordered: That Elmer Holt, as Governor of the State of Montana, be substituted as a party defendant herein, in lieu of F. H. Cooney, as Governor of the State of Montana, deceased since commencement of this suit.

Done and dated April 23rd, 1936.

Charles N. Pray, United States District Judge.

[File endorsement omitted.]

[fol. 78] IN UNITED STATES DISTRICT COURT

STIPULATION FOR CONTENTS OF TRANSCRIPT OF RECORD ON APPEAL—Filed April 22, 1936

It is hereby stipulated and agreed by and between the undersigned attorneys of record for plaintiff and appellant and defendants and appellees, respectively, that the papers on record which shall constitute the Transcript of Record on Appeal to the Supreme Court of the United States herein shall consist of the following:

1. Bill of Complaint and all Exhibits thereto attached.
2. Affidavits of John Ford and Howard F. Lill.
3. Order to Show Cause and Temporary Restraining Order.
4. Motion to Dissolve Temporary Restraining Order.
5. Motion to Dismiss Bill of Complaint.
6. Minute Entry on Motion for Interlocutory Injunction and Submission of Case on such Motion.
7. Memo Decision by Three-Judge Court on Feb. 3, 1936.
8. Opinion by Three-Judge Court on November 20, 1935 by reference to citation in 12 Fed. Supp. 946.
9. Application for Stay Pending Appeal.
10. Statement of Evidence and Stipulation and Order Thereon.
11. Minute Entry of March 6, 1936, on Submission of Stay Application.
12. Order Denying Application for Stay and Dissolving Temporary Restraining Order.
13. Decree of Dismissal.
14. Petition for Appeal, Assignment of Errors and Prayer for Reversal.
15. Statement of Basis of Appellate Jurisdiction (separately certified).
16. Order Allowing Appeal.
17. Copy of Bond on Appeal.

[fol. 79] 18. Citation on Appeal and Service thereon.

19. Statement by appellees under Paragraph 3 of Rule 12 of United States Supreme Court Rules and service thereof.
20. This stipulation.

And the Clerk of the above-entitled court is requested to forward to the Clerk of the Supreme Court of the United States, at Washington, D. C. a transcript containing only the papers designated herein.

This Stipulation is made and entered into pursuant to Rule 10 and Paragraph 9 of Rule 13 of the rules of the Supreme Court of the United States.

Dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washintgon; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 28, 1936

Comes now the appellant and adopts its Assignments of Error and Specification of Abuses of Discretion as its Statement of the Points to be Relied Upon, and states that the whole of the record, as transmitted and filed, is necessary for the consideration of the case.

Done and dated at Helena, Montana, April 25th, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellants.

[fol. 82] Service of the above and foregoing statement is hereby admitted and receipt of a true copy thereof ac-

knowledged this 25th day of April, 1936. Appellees consent to hearing on record as made and designated above.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 40,510. Montana D. C. U. S. Term No. 38. Mountain States Power Company, appellant, vs. Public Service Commission of Montana, et al. Filed April 23, 1936. Term No. 38, O. T., 1936.

(7863-C)